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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM SPEEN, *Petitioner,*

v.

CROWN CLOTHING CORPORATION,
RICHARD SILVERMAN AND JACK SILVERMAN, *Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented.

1. Are testimony that the president of the defendant company told a 71 year-old plaintiff that he was discharged in order to replace him with someone twenty years younger and company records which show that others with poorer performance than the plaintiff were not discharged insufficient as a matter of law to permit a jury to find discriminatory intent?

2. Is evidence that the defendant company exercised detailed control over the manner of performance of plaintiff's services and retained a veto over the plaintiff's providing non-competing services to others insufficient as matter of law to permit a jury to conclude that the plaintiff was an employee?

3. Does the Seventh Amendment right of trial by jury permit a federal court to enter judgment as a matter of law for the defendants under F.R.Civ.P.50(a) because a judge found inferences favoring the defendants on the above issues to be more persuasive than the showings described above?

4. Do the Article III duty to enforce the laws of the United States and the Tenth Amendment duty to respect applicable state laws allow a federal court to refuse to enforce such laws by calling compelling evidence of claims under such laws legally insufficient to present to a jury?

List of All Parties.

Petitioner

1. William Speen

Respondents

2. Crown Clothing Corporation
3. Richard Silverman
4. Jack Silverman

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petition for Writ of Certiorari

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinions of the United States Court of Appeals for the First Circuit entered in this proceeding on December 23, 1996 and on January 21, 1997 (denying rehearing and rehearing *en banc*).

Citations to Opinions Below.

The opinion of the First Circuit Court of Appeals in this proceeding is reported as *Speen v. Crown Clothing Corporation, et al.*, at 102 F.3d 625 (and 73 Fair Empl. Prac. Cas. (BNA) 347) (1st Cir. 1996). That opinion, and the unpublished January 21, 1997 denial of rehearing and rehearing *en banc,* appear in the Appendix hereto.

The unpublished opinion of District Judge Robert E. Keeton of the United States District Court for the District of Massachusetts in this proceeding was delivered orally from the bench immediately following argument on the defendants' Rule 50(a) motion for judgment as a matter of law at the close of the plaintiff's case, and also appears in the Appendix hereto, as transcribed by the official court reporter.

Jurisdiction.

The judgment and opinion of the United States Court of Appeals for the First Circuit were entered on December 23, 1997. A timely petition for rehearing (filed within a short enlargement of time to file allowed by that court) was denied on January 21, 1997, and the opinion and order on that denial are, as indicated above,

included in the Appendix hereto. This Petition for Certiorari is being filed within 90 days after the denial of rehearing.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

Article III, § 2, clause 1 of the Constitution of the United States.

The Seventh and Tenth Amendments to the Constitution of the United States.

The Age Discrimination in Employment Act, 29 U.S.C. § 623 and § 630.

The Employee Retirement Income Security Act, 29 U.S.C. § 1002.

The Massachusetts Civil Rights Act, § 1, § 4, and § 9 of chapter 151B of the Massachusetts General Laws.

Statement of the Case.

The jurisdiction of the United States District Court was invoked as a case arising under federal law, pursuant to 28 U.S.C. § 1331, with respect to the plaintiff's claims under 29 U.S.C. § 621 *et seq.* (age discrimination) and 29 U.S.C. § 1001, *et seq.* (ERISA), and also under Rule 18(a) of the Federal Rules of Civil Procedure to hear pendent state law claims (codified under 28 U.S.C. § 1367 as "supplemental jurisdiction," with no substantive change) of age discrimination under § 9 of chapter 151B of the Massachusetts General Laws, and the Massachusetts common-law tort of intentional interference with advantageous relationship.

a. The evidence at trial.

The petitioner introduced testimony and evidence that he was a full-time wholesale salesman for Crown Clothing Corporation from 1972 to 1992, working under the direct supervision of respondent Crown's president, respondent Jack Silverman, who directed the sales force.

The petitioner introduced company sales figures at trial establishing that his sales performance was average for the company, with other salesmen doing better and others doing worse, whether compared to each other or in terms of year-to-year performance over the past several years.[1] Crown had never set any quotas.

He testified that at a November 13, 1992 sales meeting of Crown Clothing, respondent Jack Silverman spoke to the him for the first time about increasing his sales. When the petitioner reminded Jack Silverman that he had already achieved a substantial increase in orders

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[1] While Speen's performance was middle-of-the-pack with respect to sales volume and year-to-year sales comparisons over the three year period prior to his firing focused on by the Massachusetts Commission Against Discrimination and the petitioner, the respondents relied upon a decline of sales by the petitioner compared to a point in time five years earlier, ignoring that even that decline was smaller than the decline suffered by another salesman over the previous three years—a salesman who was not fired. Such arguments over the proper inferences to be drawn from statistics should have been decided by the jury.

for Crown Clothing's Spring, 1993 clothing line, the subject was dropped.

He testified that on December 18, 1992, he unexpectedly received an oral notice from respondent Richard Silverman that his employment with Crown Clothing Corporation would be terminated. Richard Silverman testified that as the treasurer of Crown Clothing Company, he did not supervise salesmen.

The next morning, Speen attempted to speak with Jack Silverman. Speen was unable to reach him until December 30th. In cross-examination, Speen testified that he had discounted a previous threat by Jack Silverman to fire him as bluster uttered "in a moment of heat."

On or after December 28, 1994, Speen was sent a letter by the Plant Manager, Robert Graci, which formally confirmed that Speen "has been relieved of his duties to Crown Clothing Corp. at request of same as of December 31, 1996."

The petitioner testified that on December 30, 1993, he telephoned Jack Silverman and asked him to explain the reasons why he had been dismissed. He asked "Jack, can you justify my being let go?" to which Jack Silverman replied, "Why should I have a seventy one year old salesman when I can have a fifty one year old?"

The petitioner testified that he did not know, at the time of the telephone conversation, what Silverman meant by the remark "fifty one year old." He did not discover the age or identity of his replacement—Leonard Lipton, age 51—until about a week after his December 30, 1992 telephone conversation with Jack Silverman.

Respondent Richard Silverman testified that Crown later fired at least six other sales representatives, but did not begin those firings until two years after Mr. Speen was fired, after his case was already before the Massachusetts Commission Against Discrimination.

Respondent Jack Silverman testified that prior to the petitioner's termination, various customers of Crown Clothing Company had lobbied Jack Silverman on behalf of Leonard Lipton, who was hired to replace the petitioner.

In addition to trying to justify the petitioner's firing on a pretext of poor performance, and on the basis that they were just trying to please their customers, the respondents denied that the petitioner was their employee, but was only an independent contractor. (They put forth this same defense with respect to his claim for benefits under the company pension plan.)

The petitioner introduced company memoranda as well as testimony by himself and the two individual respondents showing that he, along with the company's other salesmen, worked under a system of continual communication and supervision by the company's president, who maintained detailed control over how the petitioner performed services for the company, including:

- to call in every night during the selling seasons (which Crown's president testified were 46 weeks a year) not only with orders but with a report on his daily activities, including feedback from his sales prospects, *whether or not a sale was made;*
- to make himself available even on weekends for supervisory callbacks by Crown's president, by leaving next day and weekend phone numbers;

- to show the whole Crown line and not to show any directly competing products;
- *being required to get permission to show specific non-competing products;*
- to keep in constant touch with his accounts;
- to attend multi-day training sessions twice a year;
- to set up meetings with his accounts at Crown's New York City office (even though this was outside his territory);
- to carry sample swatches, garment samples, and catalogs provided by Crown;[2]

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[2] This was described at trial by Jack Silverman:

"Q. Now, sir, in terms of the samples which clothing a salesman carried with him on the road, is it fair to say there were a specific set of items with which he was provided by Crown Clothing to take to accounts and show them?
A. Yes.
Q. And would you tell us what those samples would be, sir.
A. If you're selling raincoats. you take raincoat samples of the six models that we had; double-breasted, single-breasted, a polyester coat, a cotton coat, a collar coat. You took five or six models with you.

If you had topcoats, you took one model of each of the different ranges that we had; single-breasted, double-breasted and I think a fashion coat. It all depends on the year because the line changed every year.

(continued...)

- to use Crown order forms;
- and to present cards introducing himself as a Crown salesman.

Crown required the petitioner to follow up all leads Crown sent him and to report back in writing as to the results, controlled his discretion with respect to discounts, and reserved the right to fire him.

In his testimony at trial, respondent Jack Silverman testified at length explaining the contents of an April 10, 1991 memorandum "TO ALL SALESMEN" which set forth ten specific, affirmative steps for each salesman to follow since "Fall 1991 has been a very difficult season for everyone . . .":

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[2] (...continued)

As far as the sportcoats, you took two of your best numbers in a blazer or something else and maybe three or four other sample fancy sportcoats in the models; two button, three button, double-breasted, et cetera.

As far as the suits, there were four or five models. There was a double-breasted, there was a single-breasted. All depends on the year. There was a three-button, there was a two-button, there was a one-button. There was a dacron and wool. There was a 55/45. There was a hundred percent wool. There was a gab. Covered?

Q. If that's it, yes.

A. Yeah. And a corduroy."

". . . I am expecting the following from each one of you.

1. Start traveling immediately once you receive the line. No Excuses!
2. Show the entire line and not just sell items.
3. Carry a stock list for immediate goods and sell blazers and rainwear for at once delivery.
4. Take the time to write your orders properly and mail them in daily.
5. Set up dates with your accounts in the New York Office. *This is important.*
6. Keep in constant touch with your accounts.
7. It is necessary for you to help us to collect from your slow accounts to assure the expediting of his orders.
8. Call in every night as early as possible. Give a detailed report – Accounts called on and results.[3] Also, any extra information you feel we need to know. Leave a number on Thurs-

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[3] Another Crown memorandum introduced by the petitioner spelled out in greater detail his obligation to report more than just the sales he had made:

"Telephone Reporting

. . .

2. Advise who you called on, quantities sold, and which stores did not give you an order and their reason why.

. . .

4. Advise briefly of any especially strong areas or problems that are happening relative to the line.

. . .

day where you can be reached over the weekend.

9. Please respond to this letter as to what is needed in your territory for Spring 1992.

10. Send us the dates of shows in your territory.

It is important we all work as part of the "Crown Team." If you cannot follow these rules, I want to know now.

Your immediate response is requested.

Sincerely.
Crown Clothing
Jack Silverman"

In denying that the petitioner was a Crown employee, the respondents argued that he had discretion in deciding in which order to visit accounts and that they called him an independent contractor and paid him on commission, with the income reported on Form 1099. They also pointed out that he had asked to be treated as an employee and that when they refused to call him an employee and include him in their pension plan, he had formed a corporation through which he worked for them, in order to set up a retirement plan for himself.

b. The rulings below.

The case was tried before a jury in the United States District Court for Massachusetts.

At the close of the petitioner's case as plaintiff, the respondents moved for judgment as a matter of law

under Federal Rule of Civil Procedure 50(a) as to all claims. That motion was granted by U.S. District Judge Robert E. Keeton who found that, as a matter of law, that the petitioner had not introduced evidence sufficient to entitle a jury to find that he was an employee, and had not introduced evidence sufficient to entitle a jury to find discriminatory intent. (See A-30 to A-48.)

On appeal to the United States First Circuit Court of Appeals the petitioner argued that he had introduced sufficient inferential evidence and also direct evidence on the issues of discriminatory intent and Crown's exercise of control over the manner of performance of his services for it.

The First Circuit affirmed, on the basis that the petitioner's showing of discriminatory intent was negated by the respondents' statistical argument of poor performance based on the same sales figures and the presence of other elderly salesmen (A-20 to 28). It held that the petitioner's proof of detailed control over him was outweighed by the minor discretion left to him and that the respondents had labeled him as an independent contractor (A-14 to A-18).

The petitioner sought rehearing and rehearing *in banc*, and in doing so urged the First Circuit to seek clarification from the Massachusetts Supreme Judicial Court as to these issues at least as they applied to the state law claims.

The First Circuit denied rehearing on January 21, 1997. (A-49.)

Reasons for Granting the Writ.

I. The First Circuit Court of Appeals' decision improperly imposes a burden of "proof beyond a reasonable doubt" on employees and other victims of discrimination, imposing improper barriers to the enforcement of remedial laws.

This Court has made it clear that in ruling on a motion challenging the sufficiency of the evidence under Rule 50 (as also under Rule 56),

> "The Court of Appeals was, of course, bound to view the evidence in the light most favorable to [the party opposing the motion] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn."
>
> *Continental ORE Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 (1962).

Thus, this case is a clear misapplication of the standards for evaluating the sufficiency of a plaintiff's proof. Review should be granted on that basis alone. There has developed a distressing tendency on the part of the lower federal courts to quote this principle while disobeying it in practice. That is, in fact, exactly what happened here. Both the trial judge and the First Circuit recited the proper standard in their opinions, but relied instead on the inferences proffered by the respondents and gave no credence to those of the petitioner.

The particular way this was done is also not uncommon—by defining the petitioner's evidence as irrelevant to the issue, even though it included direct evidence of the ultimate questions of discriminatory intent and control over means not just ends.

The petitioner will not pretend that there is anything unique about this case, except as a matter of degree. For a federal Circuit to refuse to submit a case to a jury where there is evidence of the strength introduced here suggests an essential antipathy on the part of the Circuit to *ever* allowing discrimination plaintiffs to prevail, and, what's more, a distrust of the jury system.[4]

A. Discriminatory Intent.

The trial judge and the First Circuit have, in this case rejected the plaintiff's permissible inferences from an explicit confession of discriminatory intent and comparative sales records, and have thus made it all but impossible to prove discriminatory intent in the First Circuit.

Because people rarely admit that they are taking an adverse action against anyone on the basis of that person's membership in a protected class, this Court

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[4] This distrust is so ingrained that the First Circuit did not even comment on the trial judge's having excluded "for cause" several jurors simply for indicating that they believed that age discrimination was wrong, without asking them whether they would have any problem enforcing laws against age discrimination in accordance with the evidence they would hear.

authorized the use of an inferential method of proof of discriminatory intent:[5] The plaintiff makes a *prima facie* case, which includes adequate qualifications and/or performance and membership in the protected class and couples it with a showing of adverse action. The defendant then must show a legitimate, non-discriminatory business justification of the adverse action, which the plaintiff may rebut by showing that that justification is merely a pretext.

The objective of this inferential approach is to prove indirectly that the intent behind the adverse action was to discriminate against the plaintiff due to the plaintiff's membership in the protected class.

Since this Court's ruling in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), there is controversy over whether the showing of pretext can be accomplished by proving the defendant's justification to be false or whether, in addition, direct proof of discriminatory intent is needed as well (the First Circuit's "pretext plus" standard).

Massachusetts courts have recognized the circularity of the First Circuit's "pretext plus" standard and have refused to adopt it in cases under Massachusetts' anti-discrimination law, chapter 151B of the General Laws. See *Donald Blare v. Husky Injection Molding Systems Of Boston*, 419 Mass. 437, 444, 646 N.E.2d 111, 117 (1995).

It is important to emphasize that the instant case was brought under chapter 151B as well as the Age

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[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973).

Discrimination in Employment Act, and the Massachusetts common law tort of intentional interference. (Under *Comey v. Hill*, 387 Mass. 11, 18-20, 438 N.E.2d 811, 816 (1982) discriminatory intent constitutes malice for purposes of that tort. Because Massachusetts rejects "pretext plus" as an improper burden in proving discrimination, that rejection would extend to that tort claim under Massachusetts law as well.)

However, in this case, the petitioner *had* the plus, in the form of an unusual confession of discriminatory intent. When Mr. Speen called to ask Jack Silverman, "Can you justify my being let go?" Silverman replied, "Why should I have a 71 year-old salesman when I can have a 51 year-old salesman?" As the petitioner was, indeed, fired to hire a fifty one year old, this is as close to a confession of discriminatory intent as one is going to get in this world.

Given the circumstances in which it was made, this confession cannot be sloughed off as an isolated or ambiguous comment, as some courts have taken to doing[6] —itself a questionable practice, particularly after *St. Mary's Honor Center v. Hicks*—since such a determination rightly belongs to the ultimate finder of fact, in this case the jury.[7]

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[6] See *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989), *Leichihman v. Pickwick Int'l*, 814 F.2d 1263, 1271 (8th Cir.), *cert. denied*, 484 U.S. 855 (1987), and *Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323, 329 (1st Cir. 1996).

[7] Other evidence at trial that this statement was not

(continued...)

Jack Silverman's confession meets any standard for the "plus" the First Circuit now demands under federal discrimination law, as well as, under *any* standard, constituting direct evidence of discriminatory intent that could render resort to indirect methods of proof unnecessary. The First Circuit recognized that direct evidence of discriminatory intent would have that effect, but declined to give *this* direct evidence *any* effect, as "the better part of valor." Despite repeated claims to evaluate it in context with the rest of the evidence, the First Circuit's opinion takes no account of it at all, except to say that it makes no difference. (See A-23 to A-27.)

However, the petitioner made the indirect proof as well, showing that his performance was average for the company, that he was a member of a protected group being well over forty years of age, that he was the only one fired at the time, and that the justification of poor performance made by the respondents was false and, in light of Jack Silverman's statement, clearly pretextual.

At trial, the defendants were unable to dispute three crucial elements of Speen's *prima facie* case—that William Speen was within the protected class, was terminated, and was replaced. Hence the defendants were

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[7] (...continued)
isolated nor ambiguous was Crown's having, once it had responded to the M.C.A.D.'s interrogatories two years after the petitioner's firing, purged six of its older employees, with one of the younger salesmen, whose sales had fallen more than the petitioner's during the petitioner's last year, being promoted to sales manager and given the job of firing his elders.

left to argue that Speen had not introduced evidence that he was performing up to Crown's legitimate expectations. At trial, however, Speen showed that Crown had never set any quotas, his performance was better than thirteen of the twenty salesmen, and he was the only one fired.

It is clear that there was sufficient evidence introduced to show that the plaintiff's performance was adequate (and in fact better than most of those who were not fired).

The respondents thus also advanced a second justification which the First Circuit appears to have endorsed as well: A few customers asked them to replace the petitioner with a younger salesman they knew (A-27).

Such abdication of responsibility for legal treatment of others is not a defense under the law. If it were, "customer demand" would have been a legal defense under the civil rights laws: the Southern lunch counters, hotels, bus companies, and others could have hidden behind the desire of their white customers not to have to associate with blacks.

In a society where survival and identity are dependent on the ability to obtain and keep employment for which one has the requisite skills, no one may deprive another of the opportunity to make one's way on ability, due to some characteristic that they cannot change, such as age, race, sex, or ethnicity. This is at the level of a basic human right, and one may no more avoid responsibility for depriving another of such rights by saying that one's customers wish one to, than one could avoid responsibility by saying that one was "only following orders." The "Nuremberg defense" is no more applicable here than it was at Nuremberg.

For the trial judge and the First Circuit to brush *all* of the petitioner's evidence aside, and find that he had not introduced sufficient evidence of discriminatory intent to get the case to a jury because there were alternative inferences that could be urged by the respondents, was to effectively repeal both the federal and Massachusetts prohibitions against discrimination in employment, and Massachusetts' prohibition against interfering with another's business relationships for discriminatory reasons.

Whether this was done by saying, as Judge Keeton did, that this statement, alone or with other evidence, was not evidence from which a jury would be entitled to infer discriminatory intent (A-45), or by saying, as the First Circuit did, that it "need not decide whether Silverman's alleged statement constituted a 'smoking gun'" because it saw evidence that persuaded *it* that Crown had a non-discriminatory explanation, the result was the same either way (A-25).

Either way, the petitioner was not allowed, as required by the Rules of Civil Procedure and by the Seventh Amendment to the Constitution, the benefit of all inferences being drawn in his favor—by a jury—with judges refraining from substituting their own opinion for that of a jury in evaluating the weight of the evidence.

Instead, the affirmance was supported by drawing all inferences in favor of the respondents—and doing the weighing as well. The pretext was used to neutralize the plus.

The First Circuit has made it impossible for any plaintiff to get to a jury with the proof it requires, as it has shown that it is willing to choose a defendant's preferred inferences from facts capable of different

inferences (remember the dictum that "figures don't lie, but liars can figure") to overcome even a defendant's direct confession of discriminatory intent.

The First Circuit's opinion must be reversed on this point, as it violates both state and federal substantive law as to what constitutes evidence of discriminatory intent, and it violates both procedural and constitutional law with respect to a plaintiff's right to have this issue decided by a jury.

B. Employee Status

The clear precedent of this Court in *Nationwide Mutual Insurance Company v. Darden,* 503 U.S. 318, 323 (1992) and its predecessors is that the ultimate inquiry in determining employment status is

> "the hiring party's right to control the manner and means by which the product is accomplished"

(quoting *Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 751 (1989)). Even stronger, Massachusetts' *Comey v. Hill*, 387 Mass. 11, 15-16, 438 N.E.2d 811, 814 (1982), affirmed the following jury instruction:

> "An independent contractor is one who exercises an independent employment contract to do work according to his own methods *and without being subject to the control of his employer except as to the result of the work.*"
>
> [Emphasis added]

Comey was an very similar age discrimination case under chapter 151B. It approved that instruction in

determining whether one of the defendants in that case was the employer of a salesman who worked on commission, which did not deduct withholding taxes (apparently paying him on a 1099 in the same manner as the current plaintiff).[8]

The petitioner's extensive presentation of evidence supporting his claim to employee status is summarized above. Almost none of that evidence was acknowledged in the First Circuit's opinion, and when it did discuss trial evidence, that opinion omitted key facts and key details, and impermissibly drew conclusions to favor the moving party, rather than the opponent, both with respect to inconsistent testimony and with respect to testimony that could support differing conclusions.

As described above the petitioner was required to call in every night not only to report orders but to account for *all* sales calls made, with reporting required of *unsuccessful* calls and *why* they were not successful.

What's more, he was required to keep himself available for such continuous supervision that he was

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[8] This test makes it clear that the burden is not on the employee to show that he is subject to control "at every moment, as to every detail" in a dictum from an old Massachusetts case that hypnotized the First Circuit (though it was not even the holding in that case, which went on to treat as employees people working far from the employer and exercising discretion), but rather on the hiring party to show that the hired party was *entirely free* of control as to how the job was to be done.

Any other test leaves a loophole large enough to drive a workforce through—just leave *some* moments or *some* decisions, however inconsequential, unregulated.

required to leave a phone number where he could be reached every day, even on weekends.

Business-to-business, an independent sales agent is responsible only to register sales. The requirement of nightly accounting for every sales contact and the reasons for unsuccessful calls, and of continuous availability for supervision, is clear evidence of the right to control how the work is done, not just specification of the results to be obtained.

This piece of evidence was both legally-sufficient and constitutionally-sufficient to defeat any motion aimed at depriving the plaintiff of a jury determination of this issue.

At trial, the defendants tried to minimize the significance of some these work rules. They argued Crown's rules were in the salesmen's interest as well as the company's. However, if the salesmen were truly independent contractors, responsible only for results, they should be expected to pursue their own best interests without being held on such a short leash by Jack Silverman. The holdings below that the existence of these work rules was as consistent with independent contractor status as employment was clearly erroneous. The settled law is that the simple right—even if not exercised—to impose these rules, made the salesmen employees, rather than independent contractors.

Speen made an overwhelming showing of employee status. His testimony and exhibits showed that Crown aggressively—even intrusively—exercised control. This control extended even to the requirement to get individual permission to carry each and every *non-competing* item, and the overall relationship of the salesmen to Crown was evidenced by the salesmen's

willingness to accept all of the work rules that Crown imposed.

Jack Silverman acknowledged the economic dependence of the salesmen in explaining why he had, in later years, begun to allow them to petition him for permission to carry particular non-competing lines. *A truly independent contractor would not need to get such specific permission.* An independent contractor would be free to decide on his own what non-competing goods to carry, without having to get prior permission from Crown on a case-by-case basis. Even as "liberalized," Crown's new rule was designed to maintain the salesmen's economic dependence and subservience to Crown.

Petitioner William Speen submits that it is indisputable that he had introduced evidence sufficient to support a jury in finding that he was an employee of Crown Clothing. By refusing to allow a jury to draw the inference of control, and thus employment, urged by the plaintiff, the courts below violated his right to trial by jury on this issue.

The author of the First Circuit's opinion wasn't content to do injustice in this one case, however, but felt the need to explicitly write bad law for future cases as well.

Every formulation quoted in that opinion boiled down to the same ultimate issue of the existence or not of a right to control the manner of performance of the work.

The First Circuit's opinion accepted the petitioner's argument that the various "factors" discussed in the cases are to be considered only to decide whether or not there is a right to control. (See A-8.)

However, the First Circuit here held that the right to control can be proven by evidence of its exercise only by showing exercise "at every moment, with respect to every detail." Failing that level of proof it characterized as a "gateway" to the multifactored test (A-9), the purpose of which, however, is still to determine whether the right of control exists, even if not exercised.

It is in that exercise that the First Circuit's opinion leads to absurdity. As the test is still whether there was the right to control how the work is done, the First Circuit concluded that no reasonable jury could conclude that Crown had the right to control how the work was done—even in the face of evidence that showed that Crown exercised that right extensively on an ongoing basis.

To reach that result by reference to the label applied by the employer to the relationship and the form of compensation the employer used was to take a test designed to look behind labels to the true substance of a relationship and stand the test on its head, with the labels elevated over substance as proof in themselves, rebuttable only by proof of the substance to a level that resembles the criminal standard of "beyond a reasonable doubt."

However, as with the previous issue of intent, the inferences to be drawn from the evidence, whichever test is involved, must be drawn in favor of the plaintiff, to preserve the choice of inferences for a jury. Once again, all inferences supporting the plaintiff were ignored, with the First Circuit laboring to draw whatever inferences it could to favor defendant Crown. Ignoring the plaintiff's evidence greatly facilitated this process, of course, as did allowing defendant Crown to beg the question by using the label it chose as the conclusive evidence.

The clear implication of the decision in this case is that employers are free to externalize their costs by moving their workshops off-site, into their employees' homes, and then reap the benefit of being freed from protecting their employees under the social insurance programs so painfully attained over the last few generations.[9]

Where there was clear evidence of the exercise of control, to refuse to allow a jury to even consider it because of the employer's labeling the relationship as "independent contractor" rather than employment, and the minimal discretion left to the petitioner—about all that was left to him was deciding in what *order* he would contact his sales prospects—makes it much too easy for employers to use a simple trick of labeling (1) to deprive employees of the hard-won protections not just of anti-discrimination laws, but also of wage and hour laws, unemployment insurance, and workers compensation, (2) to avoid paying employment taxes and (3) to shirk the duty to withhold and pay over to the federal and state governments income and social security taxes.

C. This Court should state the Seventh Amendment Limits on Rule 50 and Rule 56.

The First Circuit's treatment of each of these two issues, discriminatory intent and employment status, makes this a case of national importance, but there are

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[9] Telecommuters and outside salesmen beware: With all the talk of "virtual corporations," the First Circuit has immunized "the virtual sweatshop."

other dimensions to this case as well.

The law is clear that the plaintiff had a right to trial by jury on his claims here, for age discrimination under the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*[10] and Massachusetts G.L. c. 151B § 9 (last paragraph), and for his Massachusetts common-law tort claims for intentional interference against the individual defendants. The question of Speen's jury trial right on his claim under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq*, was disputed by Crown, but neither the First Circuit Court of Appeals nor this Court has held that a plaintiff is precluded from a jury trial on claims brought under that Act. In fact, some district courts have explicitly upheld a jury trial demand when the relief sought is primarily legal, rather than equitable.[11]

Where factual issues are common to ongoing claims for equitable and legal relief, the common issues must be given to the jury.[12] It is also settled that the right to a jury trial is not lost as to legal issues merely because those issues are also raised by equitable issues.[13] Lastly, it is settled law that a claim for jury trial on legal issues cannot be lost through a prior determination of equitable

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[10] See *Lorillard, a Division of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575 (1978).

[11] See *Rhodes v. Piggly Wiggly Distribution Company*, 741 F. Supp. 1542 (N.D. Ala. 1990).

[12] *Perrez-Serrano v. DeLeon-Vellez*, 868 F.2d 30, 32 (1st Cir., 1989).

[13] *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477-80 (1962).

claims where defendant has a constitutional right to a jury trial.[14]

This Court's precedents on sufficiency of the evidence are clear, but there has been a trend developing for the past generation of treating this as a purely technical question of judicial efficiency. It is not. When there is a right to a jury trial, this is a constitutional inquiry, implicating the Seventh Amendment. The standard may be worded the same way, enforced by the same rules of procedure, but judges must be sensitive to the reasons for the guarantee of jury trials: judges and juries have very different perspectives on the world.

Juries include working people, who have had daily experience with being "bossed around" and can understand the significance of the evidence of daily micromanagement more easily than can judges who, while legally employees, are very nearly their own bosses, and may thus consider the distinction between employment and self-employment an unreal matter of semantics. By contrast, ordinary working people are taught by their life experiences to spot a domineering boss a mile away, purely as a matter of survival. After watching and listening to him on the witness stand, anyone who had ever had a real world job could recognize Jack Silverman as a classic "my way or the highway" boss.

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[14] *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959). With the exception of the specific statutory grant of a jury trial right in M.G.L. c. 151B § 9, the jury trial rights on all of these claims have been inferred by the courts as based upon the federal and state constitutions.

This is, after all, the reason for the use of juries—they represent access to the life experiences of a cross-section of the community. Judges, insulated from the insecurities of ordinary people's lives by lifetime appointments, may not, consistent with either justice or law, engage in a *sub rosa* rebellion against the Seventh Amendment's democratic command that civil cases are to be decided by juries that personify the wisdom of the community. When, like the First Circuit, they instead strain to keep cases away from jurors, they endanger the legitimacy of the judiciary —and ultimately of the society as a whole, since the judiciary enforces society's feedback mechanism— laws.

Thus, the denial of a plaintiff's right to a jury decision on the elements of a claim—which includes such traditionally "mixed questions" of fact and law as "negligence," "discriminatory intent" "malice," "lack of justification," "improper motive," and even "employment"—is a constitutionally-disfavored action.

A judge may not be allowed to weigh evidence in the manner that Judge Keeton and the First Circuit did here, and treat clear evidence both of control and of discriminatory intent as not enough to allow a plaintiff's claims to be decided by a jury. In the hands of a jurist hostile to a claim, verbal sleight-of-hand can deprive even the most compelling evidence of probative value. In such a regime, no citizen's right to trial by jury has any substance. On a claim where there is a constitutional right of trial by jury, the sufficiency of evidence to get to that jury is a "constitutional fact" that may be reviewed

de novo by this Court.[15]

The First Circuit's decision would lead one to conclude that it is no longer sufficient to show that there is a dispute of fact or inference in the evidence relating to an element of a claim or defense. Now, in the name of evaluating evidentiary "sufficiency" (or, in the summary judgment context, "genuineness" of a dispute) judges have come to ask whether the evidence in favor of a claimant is sufficient to resolve the dispute in favor of the claimant.

This is the slippery slope. It puts judges into the position of not merely evaluating the *permissibility* of various alternative inferences from the evidence but tempts judges to evaluate which inferences look persuasive enough to carry the burden of proof. That's one small step for a judge, but it's a giant leap away from the constitutionally-protected right to trial by jury.

What this case represents is the epitome of a widespread problem: the imposition of a standard of proof on employees and discrimination plaintiffs that is

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[15] The Seventh Amendment protection of the right of trial by jury on legal claims is of no lower constitutional rank than the First Amendment and Fifth Amendment protections subject to *de novo* review of "constitutional facts" under *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) and *Ashe v. Swenson*, 297 U.S. 436, 442 (1970) respectively.

While those cases may have been conceived to protect unpopular minorities from runaway juries, the Seventh Amendment is of equal importance in protecting the rights of civil litigants to the judgment of their neighbors on their claims for relief.

barely distinguishable from proof beyond a reasonable doubt.

This case thus shows the need for this Court to emphasize the inappropriateness of a judge engaging in the weighing of evidence unless and until the judge is sitting as the factfinder at trial. On summary judgment motions, even in non-jury cases, the record is too incomplete to weigh rival inferences, particularly without the ability to gauge the credibility of live witnesses, and on motions for judgment as a matter of law during jury trials, the job of weighing rival inferences belongs to the jury, not to the judge at all.

D. This Court must make it clear that federal and state legislation is not to be frustrated by the refusal of enforcement.

A federal court has no right, under Article III of the Constitution, to refuse to exercise the judicial Power delegated to it to enforce the laws of the United States, or to construe those laws out of existence; nor, when cases arising under the laws of the several states, validly enacted under the Tenth Amendment's reservation of state powers, come before it under a valid grant of jurisdiction, may it similarly refuse to enforce such state laws.

It is easy to sympathize with the desire to minimize the number of jury trials—and even non-jury trials—by dismissing cases as early in the process as possible. This is, however, not only unconstitutional but actually self-defeating. As civil society's feedback mechanism, the courts play the role of "the potent, the omnipresent

teacher"[16] when it comes to whether society really means what it says when it enacts laws to protect the weak against the strong.

Take away any real risk of being held accountable for misconduct and—all the pious words of legislation notwithstanding—a cynic (or, as cynics are wont to call themselves, a "pragmatist") may be expected to conclude that society does not truly consider such activity to *be* misconduct (*viz.* the old debate over whether there is a right if there is no remedy).[17]

As the lower federal courts have, as described above, made it clear to employers that discrimination will seldom be punished, the courts have only themselves to blame that such cases multiply, now that society, through its legislature, tells employees that the courts will protect them, while its judiciary tells employers not to worry.

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[16] *Olmstead v. U.S.*, 277 U.S. 438, 485 (1928), Brandeis, J., dissenting.

[17] As Mr. Justice Brandeis went on to note in the paragraph just quoted,

> "For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

While Justice Brandeis was speaking of crimes of commission, the same applies to crimes of omission. Those who refuse to enforce society's laws should not be surprised by the widely-noted loss of civility and accountability in society today, or by the sometimes irrational measures taken by those who have lost hope.

If, however, this Court instead makes it clear to the lower federal courts that these laws must be vigorously enforced, and that cases may not be given short-shrift, employers, being persuadable by profit (among the most rational of motivations) could be expected to bring their conduct into line with the law, and *that* would unclog the docket.

Conclusion.

The petition for a writ of certiorari should be granted.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM SPEEN, *Petitioner,*

v.

CROWN CLOTHING CORPORATION,
RICHARD SILVERMAN AND JACK SILVERMAN, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Appendix to Petition for Writ of Certiorari

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Appendix.

[102 F.3d 625; 73 Fair Empl. Prac. Cas. (BNA) 347]

United States Court of Appeals
For the First Circuit

No. 96-1402

WILLIAM SPEEN,
Plaintiff, Appellant,

v.

CROWN CLOTHING CORPORATION,
RICHARD SILVERMAN, AND JACK SILVERMAN,
Defendants, Appellees

Appeal from the United States District Court for the District of Massachusetts
[HON. ROBERT E. KEETON, *U.S. District Judge.*]

Before
CYR, BOUDIN AND STAHL, *Circuit Judges*,

Philip R. Olenick, with whom *Paul L. Nevins* was on brief, for appellant.

Timothy P. Cox, with whom *John C. Wyman* and Roche, Carens & DeGiacomo was on brief, for appellee.

December 23, 1996

Appendix.

STAHL, Circuit Judge. Plaintiff-appellant, William Speen, appeals from a district court judgment as a matter of law in favor of defendants-appellees Crown Clothing Corporation, Jack Silverman, and Richard Silverman in an age discrimination and pension rights suit involving his alleged wrongful termination in violation of federal and Massachusetts law. Because Speen failed to provide sufficient evidence to support a finding that he was a Crown employee for the purposes of his federal and state statutory claims, or evidence sufficient to support his remaining Massachusetts common law tort claims, we affirm.

Background and Prior Proceedings

Speen began his career as a men's clothing salesman following his discharge from the U.S. Army in 1945. Over the ensuing twenty-seven years, Speen served as a New England sales representative for various companies. In 1972, he became a sales representative for Crown Clothing Corporation ("Crown"). Jack and Richard Silverman respectively serve as Crown's president and treasurer.

For the next twenty years, Speen travelled throughout New England as a Crown representative hawking Crown products—sports jackets, raincoats and the like—to men's clothing stores. For some of that time, Speen, with Crown's approval, also sold non-competing lines of men's clothes from other manufacturers, most notably slacks. By 1992, however, Speen's relationship with Crown increasingly soured. Speen's immediate supervisor, Jack Silverman, often expressed his dissatisfaction with Speen's declining raincoat sales. In December 1992,

Crown notified Speen—first orally and then in writing—that his service would be terminated, effective the end of the month. Crown went on to replace Speen, then 71 years old, with a new representative, aged 51.

In June 1993, unwilling to accept Crown's adverse action, Speen filed a complaint with the Massachusetts Commission Against Discrimination (MCAD). After MCAD made a preliminary determination that it had jurisdiction over Speen's claim because it found him to be an employee for purposes of the federal and state age discrimination statutes, a determination that does not carry with it preclusive effect, Speen filed this suit in federal district court in November 1994. Speen's federal action claimed that his termination amounted to unlawful age discrimination under the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and Mass. Gen. L. ch. 151B, § 9, and also sought pension rights under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140. Speen, in addition, advanced a Massachusetts common law tort claim against the Silvermans, alleging a tortious interference with his advantageous business relationship with Crown.[1]

The matter proceeded to trial before a jury. At the conclusion of plaintiff's evidence, the defendants filed a

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[1] Speen also asserted claims under Massachusetts statutes governing minimum wage, overtime pay, and the frequency of payment of wages. In its Memorandum and Order of May 9, 1995, the district court found these claims to be time-barred under the respectively applicable statutes of limitations. Speen subsequently voluntarily dismissed these claims.

motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) on essentially two grounds. The first was that Speen was not a Crown employee, but rather an independent contractor who enjoyed no protection under the applicable statutory provisions.[2] The second was that Speen had not produced sufficient evidence to allow a jury to conclude that he was maliciously discharged because of his age in violation of Massachusetts common law. The court granted the motion, ordering a judgment for the defendants on all claims. This appeal ensued.

For the reasons set forth below, we reject Speen's arguments concerning the employee/independent contractor issue and his Massachusetts common law tort claims and thus affirm the district court's decision.

Standard of Review

We review de novo a district court's decision to grant

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[2] Crown and the Silvermans had previously filed a motion to dismiss and a motion for summary judgment on essentially the same grounds. The district court denied both motions. At the summary judgment hearing, the district court noted that the undisputed facts "weighed quite heavily toward an evaluative determination of independent contractor status," explaining that it was "very likely that that's the way it's going to appear to [the court] at the end of the plaintiff's evidence." The court nonetheless denied the motion, determining that a more appropriate time for resolving the employee/independent contractor issue would be at the close of the plaintiff's evidence in connection with a motion for judgment as a matter of law.

judgment as a matter of law pursuant to Rule 50(a). In exercising that plenary review, we use "the 'same stringent standard incumbent upon the trial court in the first instance.'" *Greenberg v. Union Camp Corp.*, 48 F.3d 22, 26 (1st Cir. 1995) (quoting *Favorito v. Pannell*, 27 F.3d 716, 719 (1st Cir. 1994)).

We thus consider the evidence and the reasonable inferences that are to be drawn from it in the light most favorable to the party opposing the motion, in this case, the plaintiff. A motion for a judgment as a matter of law "is proper at the close of plaintiffs' case only when the plaintiffs' evidence, viewed in this light, would not permit a reasonable jury to find in favor of the plaintiffs on any permissible claim or theory." *Murray v. Ross-Dove Co.*, 5 F.3d 573, 576 (1st Cir. 1993).

The Employee/Independent Contractor Issue

Crown contends that Speen cannot sue under the ADEA or the Massachusetts anti-age discrimination statute, Mass. Gen. L. ch. 151B, because, for purposes of those statutes, he is not a covered "employee," but rather an unprotected "independent contractor." Speen vigorously disputes this contention and further argues that the issue of his proper classification, in any event, was a question for the jury that should not have been decided by the district court on a Rule 50(a) motion.

Both federal and Massachusetts courts have found that the federal and Massachusetts statutes prohibiting age discrimination in employment do not reach independent contractors. See *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 509 (2d Cir. 1994); *Hayden v. La-Z-Boy Chair Co.*, 9 F.3d 617, 619 (7th Cir. 1993);

Daughtrey v. Honeywell, Inc., 3 F.3d 1488, 1495-96 (11th Cir. 1993); *Oestman v. National Farmers Union Ins. Co.*, 958 F.2d 303, 304-05 (10th Cir. 1992); *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979, 980 (4th Cir. 1983); *Comey v. Hill*, 387 Mass. 11, 438 N.E.2d 811, 814 (Mass. 1982). See generally, Francis M. Dougherty, Annotation, *Who, Other Than Specifically Excluded Persons, Is "Employee" Under § 4(a)(1) Of Age Discrimination in Employment Act Of 1967 (29 USCS § 623(a)(1))*, 125 A.L.R. Fed. 273, 287-89 (1995) (collecting federal cases).

The salience of the employee/independent contractor distinction in age discrimination cases thus is clear. Less easily discernible, however, are the tests federal and Massachusetts law use to distinguish a covered employee from an unprotected independent contractor.

1. *Employee Status Under Massachusetts Law*

In interpreting the Commonwealth's employment discrimination law, Mass. Gen. L. ch. 151B, Massachusetts courts use a common law test to distinguish employees who are covered by the statute from independent contractors who are not. *Comey,* 438 N.E.2d at 814. The parties in this case both concede this point. Where they differ is in their assessment of what factors Massachusetts courts look to in applying the common law test. Speen argues that a claimant is considered an employee under Massachusetts law if he can show that the employer enjoyed the right to control his labor. This, Speen contends, he can do. In particular, he argues he was a Crown employee because he had to call in his orders every night and fill out special Crown order forms.

Crown responds that this type of activity does not make one an employee under Massachusetts law, since a mere showing of some element of control is not conclusive under the multifactored test Massachusetts courts use to determine employee status.

Speen points to older Massachusetts cases which indicate that the test of employee status is the right to control. *McDermott's Case*, 283 Mass. 74, 186 N.E. 231, 232 (Mass. 1933) ("The exact point at issue is whether the claimant was a servant or employee, or an independent contractor. The essence of the distinction is the right of control. . . . Other considerations and tests are important only as they bear upon the right of control."); *Khoury v. Edison Electric Illuminating Co.*, 265 Mass. 236, 164 N.E. 77, 78 (Mass. 1928) ("Although the conclusive test of the relationship of master and servant is the right to control, other factors may be considered in determining whether the right to control exists, but they are subordinate to this primary test.").

Upon initial inspection, the language in these cases would seem to support Speen's contention that the district court misstated the relevant Massachusetts standard when it concluded that Massachusetts uses a multifactored analysis in distinguishing employees from independent contractors. A closer reading of the cases and consideration of later Massachusetts decisions, however, dispels this conclusion.

In *McDermott's Case*, for example, the court explained that an independent contractor is one "not subject to direction and control as to every detail of the work" to be performed. Conversely, an employee is one who "at every moment, with respect to every detail . . . is

bound to obedience and subject to direction and control." *McDermott's Case*, 186 N.E. at 232. The *Khoury* court explained this feature of the Massachusetts common law test as follows: "the employee must be subject to control by the employer, not only as to the result to be accomplished but also as to the means to be used." *Khoury*, 164 N.E. at 78.

Such language, gleaned from the decisions upon which Speen's counsel relies, indicates the great degree to which Speen and Massachusetts courts mean rather different things when they refer to "right of control" within the context of the common law test. Simply put, the level of employer control ("at every moment, with respect to every detail") necessary to conclusively establish employee status without looking to any of the additional "subordinate" factors is such that, as a practical matter, one may speak of the common law test as being a multi-factored one.

Subsequent Massachusetts case law, in fact, acknowledges as much. While recognizing the vitality of the common law test in Massachusetts, for example, the *Comey* court explained that "trial judges should carefully and fully instruct juries on all the factors that may be useful in distinguishing employees from independent contractors." *Comey*, 438 N.E.2d at 815. This language indicates that the common law test in Massachusetts, as in other states, while directed towards the question of right of control, involves the assessment of multiple factors. See *Restatement (Second) of Agency* § 220 (1957). Indeed, the *Comey* court immediately goes on to cite with approval federal cases which, it explains, "list[] factors which may distinguish employees from independent contractors." Id.

> Confronted with such language, lower Massachusetts courts have proceeded on the view that in the employment context, a master-servant relationship is determined by a number of factors, including the right of the employer to control the details of the work done by the employee, the method of payment, the skill required in the particular occupation, whether the employer supplies the tools, instrumentalities and place of work, as well as the parties' own belief as to whether they are creating a master-servant relationship.

Chase v. Independent Practice Ass'n, 31 Mass. App. Ct. 661, 583 N.E.2d 251, 253 (Mass. App. Ct. 1991).

The district court thus did not err when it determined this multifactored approach to be the applicable legal test in Massachusetts. Contrary to Speen's assertion that the district court found that "subordinate" factors might outweigh the existence of a right of control, the state cases tell us that Massachusetts courts make the employee determination in this way only when a right of control is not conclusively established and other factors need to be examined. Given how Massachusetts precedent discusses "right of control" in its technical sense, this would seem to mean the multifactored test is triggered when employer control does not encompass the person hired "at every moment, with respect to every detail." *McDermott's Case*, 186 N.E. at 232. It is thus not so much the case that additional "subordinate" factors might outweigh the existence of a right of control (as Speen wrongly contends was the district court's view) as it is

that the failure to demonstrate a "right of control" in the narrowly-defined technical sense of that term serves as the gateway to a multifactored analysis. This analysis, in turn, does not ignore but takes into account the level of control present in the employment relationship despite the fact that this control, taken alone, would not be enough to establish employee status.

2. *Employee Status Under the ADEA*

Federal courts have used at least three different tests to determine whether a claimant is a covered employee rather than an unprotected independent contractor under anti-discrimination acts such as the ADEA. The first test is the traditional common law test of agency which focuses on the employer's right of control using a multi-factored analysis. See *Frankel v. Bally, Inc.*, 987 F.2d 86 (2d Cir. 1993). The second test—typically more expansive—is the "economic realities" test, which holds that "employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947); *Doty v. Elias*, 733 F.2d 720, 722-23 (10th Cir. 1984). The third test is a "hybrid" test, which considers the economic realities of the employment relationship but retains a focus on the employer's right to control. See *Oestman v. National Farmers Union Ins. Co.*, 958 F.2d 303 (10th Cir. 1992).

The First Circuit has not previously decided which test to apply to the ADEA. In view of the Supreme Court's unanimous decision in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), we now adopt the common law test for determining who qualifies as an

"employee" under the ADEA and expressly hold that covered employees under the ADEA are those who are employees under traditional agency law principles.

While the Supreme Court has not directly determined this issue, the Court in *Darden* faced the task of interpreting a definition of "employee" found in ERISA, 29 U.S.C. § 1002(6) ("any individual employed by an employer"), that is virtually identical to that found in the ADEA, 29 U.S.C. § 630(f) ("an individual employed by any employer"). See *Darden*, 503 U.S. at 323. The Court found this to be a "nominal definition" that "is completely circular and explains nothing." *Id.* In the absence of any provision suggesting a contrary congressional design or an indication that "absurd results" would follow, the Court took the view that the term "employee" should be interpreted in accordance with traditional agency law principles:

> "where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."

Darden, 503 U.S. at 322-23 (internal citations omitted) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (internal quotation marks omitted)).

To help avoid any confusion on the matter, the *Darden* Court went on to summarize the operative common law test with the following language:

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Id., 503 U.S. at 323-24 (quoting *Reid*, 490 U.S. at 751-52 (footnotes omitted)).

The Court went on to stress that the common law test requires that "[']all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

We conclude that the Court's opinion in *Darden* is sufficiently clear to remove doubt as to the identity of the proper standard and its contours. We therefore disregard decisions in those circuits that have employed standards

other than the common law test in determining whether a claimant was a covered employee under the ADEA. See, e.g., *Oestman,* 958 F.2d at 305 (the Tenth Circuit applying the hybrid test in determining whether an insurance agent is an employee under the ADEA). But see *Frankel v. Bally, Inc.,* 987 F.2d 86, 90 (2d Cir. 1993) (holding that, in the wake of *Darden,* the traditional common law test for agency must be applied to the ADEA instead of the hybrid standard).

The *Darden* decision also circumscribes otherwise suggestive language in First Circuit case law interpreting federal employment legislation such as the Fair Labor Standards Act (FLSA). In earlier decisions, this court has looked to a line of Supreme Court precedent interpreting the FLSA and Social Security Act to reach the view that "in determining employer status, 'economic reality' prevails over technical common law concepts of agency." *Donovan v. Agnew,* 712 F.2d 1509, 1510 (1st Cir. 1983) (FLSA case) (citing *Goldberg v. Whitaker,* 366 U.S. 28, 33 (1961) (FLSA case) (citing *United States v. Silk,* 331 U.S. 704, 713 (1947) (Social Security Act case) and *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 729 (1947) (FLSA case))).

This line of cases essentially adopted the non-common law view we considered above, namely that "employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels v. Birmingham,* 332 U.S. at 130. The *Darden* Court, however, explicitly differentiated the definitions of employee found in the FLSA from that in ERISA, which virtually mirrors the ADEA in this regard. See *Darden,* 503 U.S. at 325-26. The Court's analysis of the difference between these two pieces of legislation

suggests that this circuit's earlier pronouncements in FLSA cases like *Donovan* concerning use of the "economic reality" test in determining employee status may need to be confined to the FLSA context in which they were first enunciated. In any event, in view of the Court's express reasoning in *Darden,* we feel confident in reasoning that the "economic reality" test cannot be readily imported into the ADEA context, either on its own or as part of some "hybrid" test that amalgamates the "economic reality" standard and the traditional common law approach.

3. *Speen's Status Under the ADEA and Mass. Gen. L. ch. 151B*

Based on our review of the relevant federal and state precedent, we are of the view that federal and Massachusetts law use roughly identical tests based on traditional agency law principles to determine whether a claimant in an age discrimination suit is a protected employee.

There may be some question whether the federal and state tests are employed in exactly the same way in view of some of the language in older Massachusetts decisions we considered above. These earlier opinions speak of the right of control as if it were a predominant factor that is considered before and above others, at least in some instances. This way of employing the multifactor test runs counter to instructions the Supreme Court reiterated in *Darden,* 503 U.S. at 324 ("all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.") (internal quotations omitted). To the extent any divergence between the federal and Mass-

achusetts multifactor test might exist,[3] it would seem to involve cases in which a hired party is subject to the "direction and control" of the hiring party "at every moment, with respect to every detail." *McDermott's Case,* 186 N.E. at 232.

A review of the record, however, reveals that Speen's claim does not present such a case. The record does not contain evidence that even remotely suggests Speen was subject to the "direction and control" of Crown "at every moment, with respect to every detail." We are thus convinced that federal and Massachusetts law confront Speen with multifactored tests concerning employee status that are, as a practical matter, indistinguishable.

Looking at the record with this common multifactored test in mind—even through a lens that requires us to consider the evidence and the reasonable inferences that are to be drawn from it in the light most favorable to Speen as the non-moving party—we conclude that the district court correctly granted Crown's motion for a judgment as a matter of law on the federal ADEA and Massachusetts statutory age discrimination claims.

We do not see how the jury was presented with evidence sufficient to support a finding that Speen was an employee rather than an independent contractor. Speen's counsel vigorously argues that the evidence presented established that Crown kept Speen on a "short leash" and that he had to obey "onerous work rules." The evidence

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[3] As we more fully explained above, we are not sure such a difference exists since more recent Massachusetts opinions cite federal cases and the *Restatement (Second) of Agency* in support of their discussion.

overwhelmingly shows, however, that Speen was kept on a rather long leash, if not actually allowed to run free in a rather large yard, and was allowed to follow procedures that afforded him the type of independence for which employees typically yearn.

We first call attention to the substantial number of factors that, as the district court rightly noted, weigh in favor of a finding that Speen's relationship with Crown was that of an independent contractor. The evidence reveals that Speen himself decided where he went and how long he worked on any particular day. How and in what order he covered his territory was something he determined. Speen was not required to report to a Crown place of business on a daily basis; in fact, he appeared at a Crown location infrequently during the year.

Furthermore, Speen was not required to carry anything, do anything, or say anything in particular as he went about trying to sell Crown (and other) products. Although Crown provided Speen with some business cards that announced him as a Crown representative and also provided him with samples that he was free to use in attempting to make sales, the evidence does not indicate that Crown compelled Speen to do anything in particular or somehow controlled the manner in which Speen attempted to sell men's clothing. The fact that Speen was paid on a commission basis also weighs in favor of a finding of independent contractor status, as does the fact that he received Form 1099s rather than W-2s for federal tax purposes.

Moreover, Speen had early on told his Crown supervisors he wished to be treated as an employee and in particular wished to be enlisted in Crown's employee retirement pension plan. Crown refused and gave Speen a

take-it-or-leave-it response, but Speen continued his relationship with Crown. He did not reject what was offered; rather, he accepted it and worked under this regimen for many years. The parties' understanding and Speen's exclusion from Crown's employee pension plan thus represent two additional factors that weigh in favor of a finding of independent contractor status.

Several other salient factors were also present in the Speen-Crown relationship, but the district court correctly noted that they are all compatible with either an independent contractor or employee relationship. Thus, although Speen was required to phone Crown daily and report his sales and the calls he had made, typically by leaving information on an answering machine, this arrangement is equally compatible with the status of either an independent contractor or employee.

Crown required Speen to attend two sales meetings a year that featured the introduction of the new season's line of clothing. He also was required to fill out orders he obtained on forms that Crown provided. Speen also decided to stop selling non-Crown items once he reached one million dollars in sales on Crown's line of products. The district court correctly noted that these features of the Speen-Crown relationship are essentially neutral in terms of the multifactor test, since they are equally compatible with either an employee or independent contractor status. The evidence developed at great and tedious length during the plaintiff's case on these points thus did not significantly advance Speen's view of his relationship with Crown.

On the other hand, the evidence presented reveals not only that Speen did accept the take-it-or-leave-it proposition Crown offered him, but also that he went on to

form a corporation, Newton Company, Inc. ("Newton"), of which he became an employee. Some dispute exists in the record as to the reason behind Speen's decision to establish the corporation, but its function is uncontroverted. Crown issued checks made out jointly to Newton and Speen for the commissions Speen's services earned, and Newton, in turn, paid Speen. The district court correctly noted that this fact, while not conclusive in any specific sense, constituted an additional factor militating against a finding of employee status.

Under the multifactored test, we conclude that there was not enough evidence from which a factfinder could make a reasoned determination in favor of Speen on the question of whether he was a Crown employee for purposes of the ADEA or Massachusetts law. As the district court ably determined, a finding for the plaintiff would not comport with the applicable legal standard governing employee status.

The ERISA Claim

The preceding analysis also disposes of Speen's ERISA claim. In view of the Supreme Court's unanimous interpretation of the term "employee" in *Darden*, 503 U.S. at 323, Speen can be considered an employee for ERISA purposes only if we so find using the same test we have just used to determine that he is not an employee for ADEA purposes. We conclude, therefore, that Speen's ERISA claim fails for lack of standing.

The Massachusetts Common Law Tort Claims

Speen finally appeals the district court's disposition of

his Massachusetts common law claims. Specifically, he alleged that the Silverman brothers tortiously interfered with his advantageous relationship with Crown. The district court entered a judgment as a matter of law in favor of the defendants on the tortious interference claim as well.

Under established Massachusetts jurisprudence, a plaintiff suing for relief on a claim of tortious interference must prove the existence of the following: "(1) a business relationship or contemplated contract of economic benefit; (2) the defendant's knowledge of such [a] relationship; (3) the defendant's intentional and malicious interference with it; (4) the plaintiff's loss of advantage directly resulting from the defendant's conduct." *Comey,* 438 N.E.2d at 816 (citing *Owen v. Williams,* 322 Mass. 356, 77 N.E.2d 318 (Mass. 1948)).[4]

Importantly, for our purposes here, Massachusetts case law indicates that this tort claim does not require a finding that the plaintiff was an employee, but rather encompasses independent contractors as well. See *Comey,* 438 N.E.2d at 816-17. This lifts the barrier that

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[4] Massachusetts courts have recently stated a plaintiff must prove: "(1) he had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." *Wright v. Shriners Hosp.,* 412 Mass. 469, 589 N.E.2d 1241, 1245 (Mass. 1992) (quoting *G.S. Enterprises v. Falmouth Marine,* 410 Mass. 262, 571 N.E.2d 1363, 1369 (Mass. 1991)). We do not believe this more recent formulation changes our analysis.

proved fatal to Speen's federal and state statutory claims.

The tort of interference with an advantageous relationship, of course, does not recognize a right to lifetime tenure or a perpetual business relationship. Massachusetts case law discussing the claim in the context of discharge cases explains that companies and their supervisors have the right to fire or terminate the services of hired parties so long as they do not do so "malevolently, i.e., for a spiteful, malignant purpose, unrelated to the legitimate corporate interest." *Wright v. Shriners Hosp.*, 412 Mass. 469, 589 N.E.2d 1241, 1246 (Mass. 1992) (quoting *Sereni v. Star Sportswear Mfg.*, 24 Mass. App. Ct. 428, 509 N.E.2d 1203, 1206 (Mass. App. Ct. 1987)). Under Massachusetts law, corporations and corporate officers thus possess both a qualified privilege and a corresponding "duty" to shareholders to discharge hired parties when those hired "do not measure up to the job." *Sereni*, 509 N.E.2d at 1206.

This qualified privilege and concomitant duty, necessarily, are not unbounded. The privilege does not excuse unlawful malevolence or malice in connection with a decision to discharge a hired party. Whether the requisite malice exists for a defendant to be held liable under this cause of action "depends on the evidence in each case and on what the trier of fact may reasonably infer from that evidence." *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21, 24 (Mass. 1981). For our purposes, it is only important to note that Massachusetts courts treat a showing of intentional age discrimination as sufficient to meet the proof of malice needed for recovery under this tort claim. See *Comey*, 438 N.E.2d at 816-17.

Thus, our inquiry turns to whether Speen presented sufficient evidence of age discrimination to require the

question to be put to the jury. For reasons that follow, we conclude he did not.

In reaching this result, we focus both on Speen's proffered statistical arguments regarding the treatment of other Crown salesmen and his alleged direct evidence of discriminatory motive. On the issue of use of statistical evidence, our cases[5] establish that a plaintiff need not and "should not be required to produce 'smoking-gun' evidence before prevailing in a discrimination suit. There are many veins of circumstantial evidence that may be mined by a plaintiff to this end. These include . . . statistical evidence showing disparate treatment by the employer of members of the protected class." *Mesnick v. General Elec. Co.*, 950 F.2d 816, 824 (1st Cir. 1991). Massachusetts courts have allowed the use of indirect evidence of disparate treatment, including evidence concerning "the employer's general practices and policies concerning employment of [protected classes]." *Lewis v. Area II Homecare For Sr. Citizens,* 397 Mass. 761, 493 N.E.2d 867, 872 (Mass. 1986).

The difficulty with Speen's attempts to use statistical

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[5] For the purposes of evaluating the age discrimination issue we of course focus on relevant Massachusetts precedents. To the extent, however, that Massachusetts courts approvingly cite federal cases in discussing the criteria concerning proof of discrimination, we turn to federal case law where necessary or fruitful. See, e.g., *Lewis v. Area II Homecare For Sr. Citizens,* 397 Mass. 761, 493 N.E.2d 867, 872 (Mass. 1986) (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804-05 (1973)).

evidence was not in what he was trying to accomplish but rather how. In particular, Speen attempted to rely on evidence that compared Crown's treatment of Speen and Speen's sales figures with other members of Crown's sales force. Other testimony, however, established that Crown expected different results from differently positioned sales representatives, depending on their territory, whether they were new to a territory, and other factors. In turn, Speen failed to explain why the group that he selected for treatment was an appropriate and representative sample. Judge Keeton correctly characterized Speen's statistical method as one involving "simply picking out whatever employees the plaintiff wants to pick out from all the evidence before the court, treating those as if they were the only instances, and urging the jury to draw inferences of age discrimination from that comparison." Judge Keeton was right in saying,

> That won't do . . . it doesn't take an expert on statistical method to understand that of course [it]'s not appropriate to limit yourself [to some of the population] when you're looking at evidence for the purpose of drawing an inference from a statistical distribution to pick only a few [people] rather than some [number] that can be shown in some way on a reasoned basis to be at least a representative sample if not a consideration of all the evidence.

Numbers selected in such an unreasoned fashion are not sufficient to support a reasoned inference of impermissible discrimination. Ironically, the evidence presented weighs against the finding of disparate treatment that Speen sought to prove. Out of a sales force of twenty people, all five salesmen over the age of 70 at the time Speen was discharged in December 1992 were still

selling for Crown at the time of the trial of Speen's claim in March 1996. Combined with the fact that no other salesmen experienced a larger decline in sales than Speen during the five year period 1987-1992, this part of the evidence does not permit a reasoned inference either of age discrimination or that Crown's proffered reason for terminating Speen (declining and unsatisfactory sales figures) was pretextual.

Contrary to Speen's assertions, a different result does not obtain if we consider Speen's testimony about the alleged statement that Jack Silverman made when Speen allegedly asked Silverman to justify the decision to fire him: "Why do I need a 71 year old when I can have a 51 year old?" This piece of evidence, which we must credit as true in view of the requirement that we review the evidence in the light most favorable to the nonmoving party, would still not enable a jury to draw a reasonable inference that Speen was fired due to his age.

In reaching this conclusion, we first call attention to the line of Massachusetts and federal cases which indicate that "'isolated or ambiguous remarks, tending to suggest animus based on age, are insufficient, standing alone, to prove an employer's discriminatory intent.'" *Blare v. Husky Injection Molding Sys.*, 419 Mass. 437, 646 N.E.2d 111, 118 n.9 (Mass. 1995) (quoting *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 613 N.E.2d 881, 885 n.7 (Mass. 1993) (citing *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989) and *Leichihman v. Pickwick Int'l*, 814 F.2d 1263, 1271 (8th Cir.), *cert. denied*, 484 U.S. 855 (1987))). See *Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323, 329 (1st Cir. 1996).

Speen's counsel argues that the statement was not isolated or ambiguous but rather constitutes direct ev-

idence of age discrimination and reveals that the protected characteristic—age—was a motivating factor in the decision to fire him. Speen's counsel thus urges us to conclude that "even standing alone the plaintiff's quotation of Jack Silverman's comment to him, 'Why do I need a 71 year old when I can have a 51 year old' is, if credited by the jury, sufficient to prove . . . [Speen] was fired due to his age."

We reach a contrary result because the relevant case law instructs us not to consider the statement standing alone but instead to look at all the evidence presented in the totality of the circumstances. In other words, a fact finder looking solely at the statement "Why do I need a 71 year old when I can have a 51 year old" could reach a reasonable inference that Speen was fired because of his age. But that is not this case. If we consider this statement in the context of all the evidence presented, which we must do, since we are not afforded the luxury of selectively picking and choosing what evidence we will consider, we conclude that Judge Keeton was correct in ruling that there was insufficient evidence for a jury to draw a reasonable inference that Speen was fired due to his age or permit a reasonable inference that Crown's proffered reason for terminating Speen (declining and unsatisfactory sales figures) was pretextual.

To the extent that we reach a different outcome than the one Speen urges, Speen's mistaken view of what precedent requires a court to do in a case like the one at bar explains this difference. Speen correctly notes that proffered direct evidence of unlawful employment discrimination removes a claimant's case from the well-known *McDonnell Douglas* three-part test for discrimination (prima facie case, legitimate business justification, and

rebuttal) operative in essentially the same way in both Massachusetts and federal courts. We have indicated as much. See *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 421 (1st Cir. 1996) ("On the relatively rare occasions when a smoking gun is discernible—that is, when a plaintiff produces direct evidence that the protected characteristic was a motivating factor in the employment action—the *McDonnell Douglas* framework is inapposite."); see also *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 15 (1st Cir. 1994).

Notwithstanding what Speen would have us believe, the fact that the familiar framework that guides cases involving indirect, circumstantial evidence of discrimination may be inapposite here does not conclude the matter. Specifically, whether Silverman's alleged statement actually constitutes direct evidence of discriminatory motive remains somewhat of an open question, since the line in the case law between what constitutes direct and indirect evidence of discriminatory motive is blurred rather than clearly drawn. See *Smith*, 76 F.3d at 421. References to "smoking guns" can thus be less than fruitful to the extent they obscure the fact that this Circuit has yet to define clearly what constitutes direct evidence of discrimination. See *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, slip op. at 17 (1st Cir. 1996) (citing *Smith*, 76 F.3d at 431 (Bownes, J., concurring)).

Given the relevant jurisprudence and the approach the district court took in resolving this case, we need not decide whether or not Silverman's alleged statement constituted a "smoking gun" because the result here would be the same either way. As we have previously noted in a similar case involving appellate review of a directed

verdict, "discretion is sometimes the better part of valor, and courts often wisely decide to sidestep difficult theoretical questions if answers to them are not essential to the proper resolution of a case." *Smith*, 76 F.3d at 421. As in *Smith*, "we have here a good example of such a prudential approach. The trial court largely bypassed any differential direct evidence/circumstantial evidence tamisage, preferring to go directly to a finding that, on the totality of the evidence presented, [Crown and the Silvermans] had proven that [age] discrimination did not trigger the firing." *Id.*

The evidence presented in the instant case resolves the age discrimination issue in favor of the defendants, whether we find Jack Silverman's alleged statement to be direct evidence of discrimination (a "smoking gun") or not. In particular, the evidence presented reveals that no other salesman experienced a larger decline in sales for the five year period 1987-1992. The evidence does show that some salesmen who were not terminated had sales that declined more than Speen's in absolute dollar terms in the year or two prior to Speen's termination. But other evidence shows that Crown salesmen each faced different expectations in terms of year-to-year sales, depending on the location of their territory, how long they had covered it, and other factors.

The evidence further indicates that Speen's supervisors were unhappy with Speen's performance and that Jack Silverman had complained about Speen's declining sales figures and attitude on numerous occasions in the two years or so prior to Speen's termination. In at least one instance, Silverman did so in front of other Crown salesmen, much to Speen's embarrassment. Speen's performance, however, did not improve. The ev-

idence also demonstrates that at least two of Crown's more valued customers contacted Crown on their own volition to complain about Speen or to advise Crown to replace Speen with "a real salesman." The evidence further reveals both that Crown had terminated the services of several salesmen and that other salesmen had retired. No discernible age-related pattern, however, emerges from this evidence. Those who were fired included young, middle-aged, and older salesmen. We again note that out of a sales force of twenty people, all five salesmen over the age of 70 at the time of Speen's discharge in December 1992 still sold for Crown at the time of Speen's trial in March 1996. One of those active salesmen was over 80 years old.

This proffered evidence—considered in the light most favorable to Speen, but also in its entirety—cannot be said either to permit a reasonable factfinder to reach the conclusion that Speen's firing was triggered by age discrimination or to permit a reasonable inference that Crown's proffered reason for terminating Speen (declining and unsatisfactory sales figures) was pretextual. Even if the jury credited Jack Silverman's alleged statement, therefore, Speen was not entitled to a jury verdict in his favor.

To be sure, our duty in this appeal from a judgment as a matter of law is to review the evidence and the reasonable inferences extractable from it in the light most favorable to the nonmovant, namely, Speen. While "this approach does not allow the court to consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence, neither does it pave the way for every case, no matter how sketchy, to reach the jury." *Smith,* 76 F.3d at 425 (internal quotations and

citations omitted). Put another way, "a mere scintilla of evidence is not enough to forestall a directed verdict, especially on a claim or issue as to which the burden of proof belongs to the objecting party." *Id.* at 425-26 (internal quotations omitted). These time-worn principles of law support the district court's disposition of this part of Speen's action.

Nothing in the Massachusetts cases leads us to question this result given the fact that the age discrimination issue we are considering is embedded in Speen's state common law tort claim. As we noted earlier, Massachusetts courts have explained that the requisite malice required for finding liability under a claim for tortious interference exists "depending on the evidence in each case and on what the trier of fact may reasonably infer from that evidence." *Gram,* 429 N.E.2d at 24. "Any reasonable inference of malice must, however, be based on probabilities, rather than possibilities." *Id.* at 24-25 (internal quotations omitted). In view of the language in Gram, we thus conclude that Massachusetts courts would not view Speen's claim (that he was fired due to his age) as one supported by reasonable inferences drawn from the evidence presented.

Conclusion

Speen failed to provide sufficient evidence to support a finding that he was a Crown employee who enjoyed protection under the applicable federal and state statutory provisions governing age discrimination and pension rights. Nor did he produce evidence sufficient to support his remaining Massachusetts common law tort claims. On the evidence presented, we conclude that the

district court's entry of judgment as a matter of law for the appellee-defendants was correct.

Affirmed.

Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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WILLIAM SPEEN

vs.

CROWN CLOTHING CORPORATION, RICHARD SILVERMAN and JACK SILVERMAN

CIVIL ACTION
NO. 94-12301-REK

Courtroom 11
Thursday, March 14, 1996
Boston, Massachusetts

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JURY TRIAL PROCEEDINGS

DAY 4

BEFORE THE HONORABLE ROBERT E. KEETON
UNITED STATES DISTRICT JUDGE
AND A JURY

(9:05 a.m.)

PROCEEDINGS
IN OPEN COURT

(Without the jury.)

. . .

THE COURT: Thank you.

All right. I will state my conclusion first and then explain my reasons. I will grant all defendants' motions for judgment as a matter of law as to all of the claims of the plaintiff. Now, in explaining my reasoning, I will take up first the issue of employee or independent contractor status.

As I read the Massachusetts cases, they are, taken as a group, consistent with the carefully explained relationship between the legal test and all of the factors that are to be considered by a factfinder as explained in the Restatement of Agency. Indeed, the Massachusetts opinions cite the Restatement of Agency sections in support of their discussion.

Now, it is true that in some of the Massachusetts opinions they speak of the control or right to control as if it were a factor among others, and a predominant factor among others, rather than speaking of it as the ultimate test. I don't think it makes any difference which way we look at it here. It will not affect the outcome as I analyze the evidence as it might be evaluated by a factfinder most favorably to the plaintiff. And of course, I am not only accepting when I make these rulings the plaintiff's testimony wherever it's in conflict with defendants' testimony, but also accepting all evaluative inferences that might be drawn from testimony that a reasoning factfinder could draw most favorable to the plaintiff. I am not evaluating evidence myself in making the determination that I make. I am considering whether when evaluated most favorably to the plaintiff within the bounds of permissible it would be sufficient to go to the jury.

Now, let me explain it first from the perspective of accepting what I think is correct, the way the Restatement of Agency puts the point and the way some of the Massachusetts opinions put it.

This way of stating it is that the legal test of whether the person is an employee or instead an independent contractor depends on whether, all factors considered, the jury can find that the employer had control or right to control not only the result but the manner of performance, and all of the various factors are to be weighed in coming to that ultimate conclusion.

To put the point another way, were I to submit this to the jury, the most appropriate way to submit it would be to tell them that the legal test that they are to apply in deciding whether there was an employee relationship rather than an independent contractor relationship is to determine whether, taking account of all of the evidence before them, they find that there was control or right to control beyond just the result of the performance and extending to the manner of performance. I think it would be very difficult to try to explain to the jury in a way they could understand the legal instructions to do it the way you've argued to me it should be done. But as I've said, I don't think that makes a difference, because looking at it either way, I still find the evidence insufficient to support a finding.

So even if I gave the jury that very much more complex instruction that they would have a great deal more difficulty understanding and applying saying that right to control or control are simply factors, predominant factors but just factors, I think the effect of that would be as a practical matter to leave the jury with the freedom to make their own decision about what the

law is instead of applying the law because my instruction would not be clear enough that they could understand what I was saying. And you have not given me any request for instruction that would be clear enough to explain to the jury what is your legal and factual theory on the employer-employee relationship so that I could be very clear with the jury that that was what they had to find in order to find for the plaintiff.

Now let me explain why whichever of these two ways of phrasing the legal test the evidence in this case is is simply not sufficient to support a finding of employee status.

Among all the factors as to which there is evidence—well, let me stop for a moment. Of course, there is a listing of a lot of factors in the Restatement of Agency and in the decisions. No individual case that goes to a court and jury ever involves all of the factors, so of course when there's no evidence on a factor, that factor is simply neutral. It weighs neither way. And indeed, if there is any doubt about whether evidence on that factor would potentially weigh one way or the other if there were evidence, the absence of evidence weighs against the party with the burden of proof, and of course the party with the burden of proof on this issue is the plaintiff.

Now, with respect to the factors in this case as to which there is evidence, I call attention to a very substantial number that weigh in favor of a finding that there is an independent contractor relationship.

The fact that the pay is on a commission basis weighs that way.

The fact that 1099's were used rather than W-2's weighs that way.

The factor that not only was that the practice, but that

the plaintiff Speen understood that would be the practice and indeed from time to time made some protests about handling matters that way and those protests were rejected, and he understood that his wish to have the relationship changed was not accepted and he continued to proceed under that arrangement.

There is an interesting factor about the way the case was tried. A high percentage of the evidence in this case was not relevant to the issues on the basis of which I am making my determinations, but instead was evidence that in various ways Speen was treated unfairly. Well, that does not strengthen the potential inferences that he was an employee. Indeed, if it weighs any way at all with respect to the employer-employee situation, it weighs in favor of the independent contractor status, that the company was persisting in treating him not as an employee but as an independent contractor with respect to whom they had greater freedom about how they dealt with him, greater freedom to deal with different independent contractors on differential bases on their own judgment that that was justified for whatever policy reasons they might have. So the evidence with respect to his complaints about how he was being treated in comparison with others is not evidence that aids in this issue in any way. Indeed, if it has a bearing, it has a bearing weighing against the finding of employee status.

Also among the factors there was evidence that Speen himself determined when and where he went on any particular day and how he organized where he started working through his territory during the various selling seasons.

There was also as a body of evidence weighing as factors against a finding of employee status and in favor

of a determination that it was independent contractor status that he was not required to go to the Crown place of business for daily work and indeed appeared at any Crown place of business on a very infrequent basis throughout the year.

Now, I've listed many, not all, of the factors as to which the evidence very clearly weighs in favor of a determination of independent contractor status and against employee status. I refer now to several factors that have little weight, if any, one way or the other. That is, these are factors that are compatible with either kind of relationship, one in which there is a right of control only as to result or instead a right of control with respect to manner of performance.

That he was required to call in daily and leave information on the answering machine or in some other way make reports about calls that he has made and about orders is one of those factors that would be compatible with either kind of relationship.

The fact that he was required to attend two sales meetings a year, but not more than that ordinarily, in which the season's line was being introduced is a factor that is mostly neutral, compatible with either form of relationship.

The factor that he was required to fill out forms on the order forms that Crown provided is another of those that is compatible with either kind of relationship.

The fact that he did in fact drop the outside line of product when he reached one million sales volume is likewise a matter that is neutral.

Now, those are the factors that are being argued to me primarily as factors that weigh in favor of a finding of employee status. They simply don't rise to that level.

They, if weighing at all in that direction, do so in a kind of minimal way, because they are equally compatible with a relationship which is an independent contractor relationship.

Now, I think there is an implicit argument in the plaintiff's position that is not quite made explicit that I need to address. What do we mean by right to control the result? Now, let me take an analogy for a moment that I think will help to explain the ambiguity in the way the plaintiff is arguing this matter and the implicit definition of result that is not consistent with the law.

Let us take the classic independent contractor status when a prospective home owner engages a building contractor to build a house. And of course in that relationship the prospective home owner often has in the total contractual relationship an architect or other person, architect or engineer or on-site person, who is keeping up with what's going on as the house is being built, because of course the home owner is not able to know whether the lumber that's being put into it, the plumbing that's being put into it meets specifications, so the home owner has no way of knowing the result for which the home owner contracted, not just a house, not just any house, and not just any house with the same square footage, but a house that met the specifications of the contract. Now, the fact that there is an arrangement for monitoring what's going on, for daily reports or weekly reports or whatever it may be under the terms of that specific contractual arrangement, doesn't mean that the home owner becomes the employer of the building contractor as an employee.

Now, I use that illustration to make the point that we have to be a little more precise when we're thinking

about right to control the result, and the result with respect to a salesman of a line of men's clothing is not simply sales volume. The result that the employer may retain the right to control without converting the salesman into an employee rather than an independent contractor extends to matters such as, for example, requiring that orders be placed in the form required by the employer so that they may be placed on the agenda for being filled, that they don't get lost, that there is some monitoring, checking, reporting, response to reporting, in order to assure that specific orders do not get lost.

So the point I am making by this is that the definition of result that is implicit in the body of precedents and statutory provisions with respect to what constitutes employee status is not as narrow as the plaintiff is implicitly asking me to rule and tell the jury it is in relation to the test that's to be applied by the factfinder, if it goes to the fact finder, and the test I am to apply in determining whether there is enough evidence here to be sufficient to go to the factfinder.

Now, I have spoken about the principal factors as to which there is evidence in this case weighing in favor of the independent contractor status, the principal factors as to which there is evidence which are virtually, if not entirely, neutral and therefore have very little weight.

I think I should call attention also to the fact that there is additional evidence before me that I have not thus far referred to as one of the factors weighing in favor of the independent contractor status, but if it weighs at all would weigh that direction, and that is that the plaintiff, Mr. Speen, set up the Newton Corporation.

The defendants have argued that there was no privity between Speen and Crown for that period of time

because of the existence of the Newton Corporation. I am not accepting that argument on behalf of the defendants. I do call attention to the fact that I am not relying on that basis, but also calling attention to the fact that this is certainly not a body of evidence that helps the plaintiff in any way with respect to the evaluation of the whole range of factors that come to bear upon whether it can be found on a reasoned basis from evidence in this case that there was a right to control or control-in-fact exercised beyond that that is compatible with controlling result and compatible with the independent contractor status.

Now, as I suggested, of course, in the course of the colloquy during the argument, the labels that the parties put on this matter are not controlling. That applies to both sides. So I am looking through labels to substance as I evaluate whether or not there is enough evidence that a factfinder could make the determination in favor of the plaintiff, and I conclude that the evidence simply will not support a reasoned finding for the plaintiff on the alleged employee relationship.

Now, I have been speaking in general of this evaluation of the testimony, potential evaluation of it by a jury and whether there's enough to go to the jury, under what we commonly refer to as the common-law standard for evaluation. I accept the position that plaintiff has argued to me that there is strong support in the precedents for taking that view of the matter under Massachusetts law in relation to the statutory based claims as well. But in any event, as I have said to you earlier in these proceedings in relation to the motions that were presented for summary judgment and on the pleadings at earlier stages, if there are differences among

the standards as applied in the three different contexts of the statutes and along with that the common-law view, they are not such as would in any way aid the plaintiff in this case. There's no identification of any difference in the precedents that would have a relationship to the instructions to the jury about what would be the standard for deciding employee relationship or instructions I should be following in evaluating whether the evidence is sufficient to go to the jury.

Now, those are the reasons I have come to the conclusion I do with respect to the employer/independent contractor issue and of course those are decisive of a large number of the claims in this case and I need not address other issues. I turn now to the other issues that at least arguably need to be addressed with respect to some of the other claims.

Comey vs. Hill is in some respects close to this case, in some other respects quite clearly distinguishable from the case before me, so I view the rulings that I am making in all respects as consistent with what the Supreme Judicial Court has declared, both holdings and explanations that might be thought to go beyond holdings, that were essential to the outcome of that case. I think my conclusions are entirely consistent with what the SJC has stated in that opinion as well as what it more precisely held.

On that basis, I recognize that the determination that I have made that there is no evidence sufficient to go to the jury on the employer-employee relationship is not decisive of the other claims that are made by the plaintiff in this case. There is under Massachusetts law a possibility of a claim not only under interference with contractual relationships, which I will come to in a few

moments, but also with respect to the consideration of age discrimination as a factor in a claim founded on some other basis than intentional interference.

Now, that is not precisely the same kind of claim when it's age discrimination in employment involving an employee as it is when it's age discrimination in some other kind of relationship, which would include the independent contractor relationship, and I think there are serious questions about whether in the circumstances of this case that theory of liability could be extended beyond the employee relationship, but I assume for the purposes of my ruling on the defendants' motion for judgment as a matter of law that plaintiff is correct in arguing that that determination I have already made is not decisive of this claim.

I turn to the evidence that is before me with respect to age discrimination. If that evidence is relevant, it must extend not only to being evidence sufficient to find that age discrimination was a motivating factor for treatment and for termination in this case, but also that implicit in that motivating factor requirement is a causal connection requirement as to which the evidence has to be sufficient to support a finding for the claimant, and my conclusion is that the evidence before me in this case is not sufficient to meet that causal connection requirement.

I am, of course, accepting the plaintiff's testimony for the purpose of this ruling; that is, assuming that the jury would credit the plaintiff's testimony rather than the conflicting testimony of others that the statement was made to him, in effect: "Why should I keep a 71-year-old salesman when I can have a 51-year-old?" I assume that to be a part of the evidence.

It becomes relevant at this point to address the

plaintiff's argument to me, made again this morning and made previously in proceedings outside the presence of the jury, that the plaintiff has enough evidence to go to the jury on the age discrimination as a factor and as a motivating factor in the decision by simply picking out whatever employees the plaintiff wants to pick out from all the evidence before the Court, treat those as if they were the only instances, and urge the jury to draw inferences of age discrimination from that comparison. That won't do. That is not a permissible line of reasoning. That is a resort to statistical evidence. Whether you want to call it that or not, that's what it is in its nature, and it doesn't take an expert on statistical method to understand that of course that's not appropriate to limit yourself when you're looking at evidence for the purpose of drawing an inference from a statistical distribution to pick only a few rather than something that can be shown in some way on a reasoned basis to be at least a representative sample if not a consideration of all of the evidence.

In that connection, I think this is an extraordinarily inappropriate case for that kind of argument to be made when the evidence that's been presented by the plaintiff brings to the Court's attention and to the jury's attention the whole range of all of these salesmen and, as indicated by the chart that's still showing where we can all see it over here, it turns out that the sales force includes people up to ranges four in the 71 to 80 range and one in the 81 to 90 range and all five of those continue to be in the sales force. It is something of an irony that a statistical argument is being made to me and to urge that it's enough as an argument that might be made to the jury to support a reasoned inference by the jury of age

discrimination when we have that stark circumstance with respect to examining the whole range of statistical evidence before the Court and jury in this case.

So in summary, then, with respect to this point, I conclude that the evidence is not sufficient to support a reasoned inference from evidence of age discrimination as a motivating factor for the termination in this case or, for that matter, for the treatment of the plaintiff during the period that the independent contractor status remained in effect before the termination.

Now I turn to the cause of action with respect to intentional interference with business relationships. And before I leave commenting upon the *Comey* case, of course it is correct as defense counsel has pointed out that there is a material distinction here, that this is not a case of an unrelated entity being sued for intentional interference with the contractual relationship and plaintiff has accepted the proposition that on this point it would not have the intentional interference cause of action against the corporate entity but is instead bringing that action against the individuals. Defense counsel is correct in noting that that presents an issue with respect to qualified privilege which was not before the court in the *Comey* case.

Now, the Appeals Court of Massachusetts in *Serini vs. Star Sportswear,* 509 N.E.2d 1203, has defined somewhat more precisely than plaintiff's counsel wish me to do in the instructions you have suggested to me and in your argument to the jury what it takes to defeat the qualified privilege, and I quote from page 1206.

> "The qualification to the privilege was that Swann might not do so"—that is, act against the interests of the plaintiff—"might not do so malevolently, [that is],

for a spiteful, malignant purpose, unrelated to the legitimate corporate interest."

The court at that point, the Appeals Court, cites the Supreme Judicial Court in *Gram vs. Liberty Mutual Insurance Company* where similar language appears. The *Gram* case is at 429 N.E.2d 21, and I'm reading from page 24.

"The evidence did not warrant a verdict against Gosselin or Fisher on Gram's claim that each intentionally interfered with his contractual rights with Liberty. Because Gosselin and Fisher were acting within the scope of their employment responsibilities, Gram acknowledges that each was privileged to act as he did unless he acted out of malevolence, that is, with 'actual' malice."

Now, of course, the argument was not even being made to the Supreme Judicial Court otherwise, you might say there, but nevertheless, I find that the combination of those two decisions, the *Serini* case by the Appeals Court and the *Gram* case, establish the test under Massachusetts law that it's not enough to show that the individual acting here, the two Silvermans individually or either of them, might have had some personal animosity growing out of relationships and what had occurred. The plaintiff's burden is to show that they were acting, as one of these two opinions suggests, either solely or at least predominantly out of that malevolent motive rather than to serve the corporate interest.

Now, the evidence is overwhelming here, and the jury could not find otherwise, that neither of those actors was acting at all in the interest of the corporation in relation to the determination for this charge, so for those reasons the evidence is in this case entirely insufficient for the

jury to draw a reasoned inference that the actions meet the standard required by Massachusetts law with respect to malice or malevolent purpose.

Now, finally, I come again to whether—as plaintiff has argued, the so-called smoking gun, which I assume to be present because I am accepting that the jury would credit Speen's testimony on this rather than that of the Silvermans. I come to the question whether that testimony by the plaintiff—that the statement was made over the telephone: "Why should I have a 71-year-old salesman when I can have a 51-year-old?" I haven't quoted it exactly the way it was said, indeed the evidence put it a little different way at different times, but that's the point to which I am referring.

This is an issue on which the plaintiff has the burden of proof, but I think that too is not really decisive, because I must consider in this connection not only Massachusetts law, but also federal law that applies to the court's consideration of whether the evidence is sufficient to go to a jury and to survive a motion for judgment as a matter of law.

In that connection, I call attention to the First Circuit decision in *Medina-Munoz vs. R.J. Reynolds Tobacco Company*, 896 F.2d 5—that's a 1990 decision—in which the court makes a statement and calls attention to earlier First Circuit precedent—and there have also been other cases later citing and applying this—and I quote from that opinion at page 8.

> "We have interpreted Rule 56 to mean that '[t]he evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve.'" I delete the

citations.

"'If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.' Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation."

There have been other First Circuit cases that explicitly deal in the discrimination context with the precise problem here of some alleged statement made at some point applying this standard of the First Circuit. Of course, the standard is precisely the same on summary judgment as it is on the motion for judgment at the end of the plaintiff's case in the trial before the jury, which is where we are in this instance. It is my conclusion in this case that that one statement either standing alone or taken together with whatever additional inferences might reasonably be drawn from the evidence in this case is not sufficient to present an issue for jury determination with respect to defeating the qualified privilege which the law of Massachusetts establishes applies here.

Now, that completes my statement of the reasons for my decision. Before I go any farther, I will invite either of you to tell me if you think there is some issue I have not addressed or some authority I have misunderstood.

You may speak now if you wish.

MR. NEVINS: Your Honor, with all due respect,

I do not believe that the standards that you applied with respect to the issue of an independent contractor versus employee comport with settled Massachusetts law. Your Honor, I understand that you've—

THE COURT: Wait a minute. I didn't quite

understand what you said.

MR. NEVINS: I think they are narrower, more invidious, and in fact they misstate the applicable law.

THE COURT: What was the word you used, "comport"?

MR. NEVINS: Comport.

THE COURT: All right. I understand.

MR. NEVINS: What I am concerned about, Judge, is, I think—and I'll leave it at this because you've rendered your decision—that what has happened is that the inferences in the light—the evidence most favorable to the party opposing the motion, although the appropriate words have been spoken by your Honor, have not been applied.

I regret to say, your Honor, that what this suggests to me as plaintiff's counsel, as someone who has been plaintiff's counsel in many, many civil rights cases, it further confirms a suspicion that has percolated among those of us who labor on behalf of these issues—and I regret and I lament this fact—that the congressional intent in enacting the Age Discrimination in Employment Act or the Supreme Judicial Court's decision in *Blare vs. Husky,* which suggests that a more humane, more flexible standard ought to be applied, has not been applied in this particular case. It confirms a suspicion, I regret to say, and it's certainly been articulated many years by the First Circuit in its pretext-plus standards, that the federal courts have now become an extremely hostile forum to plaintiffs who seek to vindicate their rights.

I cannot believe, your Honor, under the standards of the evidence as you stated them today, that there was any conceivable basis on which a plaintiff could demonstrate that he is an employee as opposed to an independent

contractor. A professor who worked for a five-college consortium in Massachusetts under those standards, because as a professional he exercises discretion and intellectual judgment and his pay perhaps might be rendered on some consortium trust fund, under the standard your Honor has articulated I believe would be found to be an independent contractor.

The standard surely which is relevant to the issue of independent contractor is the degree of professional discretion exercised. Even physicians and academics who are imparted with wide discretion do not thereby obviate or undermine their status. Here we have clear statements that on a regular basis this individual was subject to the right to control.

And, your Honor, with all due respect, Mr. Olenick and I have spent many hours looking at that law. It is briefed. The Supreme Judicial Court in decisions going back to *O'Hara's Case* in 1941, citing *McDermott's Case*, have explicitly stated it is not even the exercise of control.

It is the right to control. And the issue of right is not a question of settled law. It's a question of concepts. Do they have the right? Have they abrogated it in any way?

The evidence in this case shows they had the right. No statement was ever made that we abrogate as the employer. And furthermore, we have absolute indicia of the exercise of the right. The fact that it was not exercised all the time does not undermine or undercut that presumption. And the fact that there may be factors that militate for or against, telephone calls and a variety of other things which your Honor discussed, are inferences which permissibly are drawn by the jury and should be even under Rule 50(a) of the federal standards

and the sufficiency of judgment standard.

Your Honor, I accept as an officer of this court the decision that has been rendered, but I feel, sadly, that this is a travesty of justice.

THE COURT: All right. Your statement stands on the record. It does not persuade me to change any of my conclusions.

. . .

(Proceedings concluded at 10:46 a.m.)

[End of trial transcript.]

Appendix.

United States Court of Appeals
For the First Circuit

No. 96-1402

WILLIAM SPEEN,
Plaintiff, Appellant,

v.

CROWN CLOTHING CORPORATION,
RICHARD SILVERMAN, AND JACK SILVERMAN,
Defendants, Appellees

Before
TORRUELLA,* *Chief Judge,*
SELYA, CYR, BOUDIN, STAHL and LYNCH,
Circuit Judges.

ORDER OF COURT

Entered: January 21, 1997

The panel of judges that rendered the decision in this case, having voted to deny the petition for rehearing and, the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

Appendix.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:
WILLIAM H. NG

Clerk.

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*Chief Judge Torruella did not participate in the denial of the petition.

[cc: Messrs. Olenick and Cox]

Appendix.

United States District Court
District of Massachusetts

WILLIAM SPEEN
PLAINTIFF

v. CIVIL ACTION: 94-12301-REK

CROWN CLOTHING CORPORATION,
RICHARD SILVERMAN,
AND JACK SILVERMAN,
DEFENDANTS

FINAL JUDGMENT
March 15, 1995

KEETON, D.J.

On the rulings of record on motion to dismiss, waiver of other claims by plaintiff at the start of trial, and rulings of the court on all other claims sustaining defenants motion for judgment as a matter of law at the close of the plaintiff's evidence, it is hereby ORDERED:

Judgment for the defendants on all claims.

By the Court:
ROBERT J. SMITH, JR.,
Clerk

By: s/_____

Appendix.

Constitution of the United States of America

Article III. Judicial Power

Sec. 2, Cl. 1. Subjects of jurisdiction.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

. . .

Amendment 7

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

. . .

Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.

Appendix.

Title 29. Labor

Chapter 14. Age Discrimination in Employment

§ 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

. . .

§ 630. Definitions

For the purposes of this Act [29 USCS §§ 621 et seq.]—

. . .

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

Appendix.

Title 29. Labor

Chapter 18. Employee Retirement Income Security Program Protection of Employee Benefit Rights General Provisions

§ 1002. Definitions

For purposes of this title:

. . .

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

. . .

Appendix.

Massachusetts General Laws ch. 151B.

Unlawful Discrimination Because of Race, Color, Religious Creed, National Origin, Ancestry or Sex

§ 1. Definitions.

As used in this chapter

. . .

6. The term "employee" does not include any individual employed by his parents, spouse or child, or in the domestic service of any person.

. . .

§ 4. Unlawful Practices; Certain Records to be Kept; Employer, etc., Not Required to Grant Preferential Treatment to Any Individual or Group.

It shall be an unlawful practice:

. . .

1B. For an employer in the private sector, by himself or his agent, because of the age of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

. . .